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Are Moral Rights Necessary for the Justification of International Legal Human Rights?

Andrea Sangiovanni

[to appear in *Ethics & International Affairs*]

Allen Buchanan's *The Heart of Human Rights*¹ powerfully challenges philosophers writing on human rights to clarify the relation between moral rights and international legal human rights. He claims that the dominant perspectives on human rights are committed to, though they never explicitly avow, what he calls the "Mirroring View," namely, the view that the existence of an individual moral right is both necessary and sufficient for the justification of any international legal human right (ILHR). Such individual moral rights serve as necessary and sufficient conditions for justifying ILHRs in one of three ways: either (1) ILHRs have exactly the same content as correspondent moral rights (for example, ILHRs against torture might be justified because there are underlying moral rights against torture); (2) ILHRs are a specification of a moral human right (in the same way as freedom of the press is a specification of the more general right to freedom of expression); or (3) ILHRs are instruments for serving or protecting moral rights (for example, a right to democratic participation might serve to protect or realize an underlying moral right to equal status). He then argues that the Mirroring View is false: an underlying moral right is neither a necessary nor sufficient part of the justification of a corresponding ILHR in any of these three senses.

In this essay I will not assess whether Buchanan is right to attribute the Mirroring View to any particular contemporary writer on human rights. I will also grant that the existence of a moral right—even a general moral right—is not sufficient to justify a corresponding ILHR. This is because the sufficiency claim strikes me as self-evidently false:

not every individual moral right ought to be legally protected. Among my moral rights, I have a general moral right not to be lied to. But it would be absurd to claim that I therefore ought to have an ILHR not to be lied to.² The necessity claim—the other half of the Mirroring view—is much more interesting. If Buchanan is right, then it becomes very unclear whether philosophers should continue spending so much time focusing on the moral rights that are often claimed to undergird human rights practice. They ought instead to focus on the ILHR system and keep an open mind about what considerations might best justify it.

I argue here that Buchanan is wrong to reject the necessity claim, and that the existence of an underlying moral right is a necessary part of any successful justification of an ILHR or set of ILHRs. This underlying moral right need not have precisely the same content as the ILHR it aids in justifying, but it must serve as an essential part of the rationale for the implementation of the ILHR. I will call this claim the “Grounding View” to distinguish it from the much stronger “Mirroring View.”

AGAINST THE NECESSITY CLAIM

Buchanan advances his argument against the necessity claim mainly through a series of examples. Here is one to which he often returns:

[The legal right to health] admits of a powerful pluralistic justification that does not include an appeal to an antecedently existing moral right to healthcare. A legal entitlement to goods, services, and conditions that are conducive to health, which include but are not limited to healthcare, can promote social utility, contribute to social solidarity, help to realize the ideal of a decent or a humane society, increase productivity and to that extent contribute to the general welfare, and provide an efficient and coordinated way for individuals to fulfill their obligations of beneficence.³

The key to the argument lies in Buchanan’s use of the distinction between *directed* duties on one hand and *nondirected* duties and broader social goals on the other. Buchanan assumes

that the moral rights in question are what Wesley Hohfeld called *claim* rights.⁴ A claim right gives its possessor a claim to the performance, by some specified third party, of an action or set of actions. Claim rights thus correlate with third-party duties owed to the right-holder. The duties are *directed* duties: by violating them one does not just do wrong in general but wrong *to* the individual right-holder. When I break my promise to you, I wrong you in particular. Not all moral duties are, however, directed. I might have a duty, for example, to promote the general welfare. If I violate this duty, I do wrong, but I wrong no one in particular. One influential explanation for why the former but not the latter is a directed duty points to the structure of the interests in each case.⁵ The fact that in the first case it is your general individual interests that explain the moral force of my duty not to lie implies that when I break my promise I wrong you, rather than merely do wrong in general. On the other hand, because no one individual's interests are sufficient to ground moral duties to promote the general welfare, the latter duty is nondirected. I will rely, as does Buchanan, on this interest-based account of the directedness of a duty. Although I will not make good on this claim, I believe the same argument would hold were we to adopt a will-based or demand-based account of the directedness of the duties or other, more complicated, hybrid accounts.⁶

The distinction between directed and nondirected duties gives Buchanan a strategy for rejecting the necessity claim: If Buchanan can show that at least one ILHR can be justified by appeal solely to nondirected duties and broader social goals, then he has shown that underlying moral rights are not a necessary part of any successful justification of an ILHR. I will argue Buchanan's argument does not succeed, and does not succeed for reasons that he himself has provided in his book.

AN EXAMPLE

To make my task even more difficult, I will work through Buchanan's preferred example, namely, the right to health. If any ILHR is susceptible to a justification without appeal to underlying moral rights, then the right to health, we might think, would be one.

According to Human Rights Watch, there are an estimated 10 to 15 million artisanal gold miners working worldwide.⁷ In some regions, 20 percent are children. Most miners—including children—use mercury to extract gold from the ore. Prolonged exposure to mercury can cause severe cognitive impairments in children; in adults, symptoms of exposure include tremors, twitching, vision trouble, headaches, and memory and concentration problems. Mercury can also adversely affect the cardiovascular system, the kidneys, the gastrointestinal tract, the immune system, and the lungs. Human Rights Watch mentions in particular Mali and Papua New Guinea, where there has been very little enforcement of health and safety regulations to protect workers, and where workers are not informed by employers or by the government regarding the effects of mercury.⁸ This is a paradigmatic instance of a violation of the right to health.

Have any individual moral rights been violated? If we accept Buchanan's position, then we must conclude that there need not be. We must conclude that to explain the moral urgency and force of the workers' claims, it would be sufficient to advert to any of the broader social and moral goals listed in the passage cited above, such as solidarity, social utility, efficiency, beneficence, and so on. This does not strike me as plausible. The workers' claims are compelling not simply as aspects of broader and valuable goals or nondirected moral duties. Rather, they are compelling because the workers have morally weighty individual interests in living a life free of debilitating illness and cognitive impairment—interests that are sufficiently weighty to put employers and the governments under directed moral duties to inform and protect workers (especially children) from the harmful effects of mercury poisoning. The legal human right to health is therefore justified, on this

understanding, (in part) as a mechanism for protecting individual moral rights to notification and warning by employers and governments. By violating the legal human right by failing to notify, we therefore wrong the individuals involved, rather than merely do wrong in general.

One might grant that the legal right to health can be justified by appeal, in such paradigmatic cases, to the existence of directed moral duties, and hence to moral rights. But that claim is not enough to show that such an appeal is necessary for the justification of an ILHR to health *in general*, let alone that such a justification is necessary for *all* ILHRs. It might seem that to provide such a case I would need to individuate and enumerate the justification for each and every (justified) ILHR, which would be unwieldy and well-nigh impossible. There is another route, however. If I can show that the *very point* of any ILHR is to single out standards whose violation morally wrongs us as individuals, and hence violates a set of directed duties, then I can show that any plausible justification of ILHRs must include a reference to moral rights. In short, I will argue that, for a (justified) international legal right *simpliciter* to plausibly count as an international legal *human* right, it must serve to protect a universal-concern-meriting individual moral right. This is what makes ILHRs distinctive, and what makes them worth fighting for. If this is true, then any plausible justification of an ILHR must show how the right functions to protect an underlying moral right. And I want to claim that Buchanan himself is committed to this claim.

INTERNATIONAL LEGAL RIGHTS AND INTERNATIONAL LEGAL HUMAN RIGHTS

There are many international legal rights that could not plausibly be considered ILHRs. Legal rights establishing the powers, privileges, claims, and immunities of state parties to the treaties establishing the European Union provide one example. But so do the legal rights of diplomats to immunity from prosecution. These are legal rights held by individuals and justified on the basis of nondirected duties and broader goals. More specifically, they are

justified on the basis of protecting the ability of diplomats to conduct negotiations without fear of retaliation by host governments, and so are based on more general individual interests in peace. So why cannot they be plausibly considered ILHRs?⁹ After all, they are held by individuals against states, enshrined in international law, and issue in a range of legal duties. Buchanan himself provides the answer:

The basic idea of the system of international legal human rights is *to develop a regime of international law whose primary function is to provide universal standards for regulating the behavior of states towards those under their jurisdiction, for the sake of those individuals themselves.*¹⁰

Because international diplomatic rights are enacted for the sake of the states that implement them, and ultimately, therefore, for the sake of general interests in peace rather than for the sake of individual diplomats themselves, they cannot plausibly be considered ILHRs.¹¹ This strikes me as exactly right, but it has the implication that ILHRs must protect, ultimately, individual moral rights. Let me explain. If the essential, defining function of ILHRs is to serve, for their own sake, the individual interests (or status¹²) of the right-holders themselves, then any plausible justification of an ILHR must demonstrate how it serves that essential function. This implies, however, that for an international legal right to be an international legal *human* right, the interests of the right-holders themselves must play a necessary role in explaining why others have morally justified legal duties to serve or protect those interests. If that is true, however, were third parties to violate the morally justified legal duties protecting those interests, they must also morally wrong the individuals whose interests they are. To illustrate: When a diplomat is rightfully charged and convicted for shoplifting, their legal rights to immunity have been violated, but it would be implausible to argue that they have been morally wronged as a result. This is precisely because their individual interests play no essential role in justifying the legal duties borne by the host government.

Contrast this case with that of the gold miners. Because their individual interests play an essential role in grounding legal rights to notification that are essential components of the legal right to health, thwarting those rights morally wrongs them as individuals. Since moral wrongings entail directed duties, and so moral rights, we can conclude that for an international legal right to be an ILHR, it must ultimately serve to protect underlying moral rights, and so be justified (at least in part) in terms of those rights. And this makes sense. When we fight the injustice of the gold miners' situation, or when we bring attention to their plight in a Human Rights Watch report, we fight for *them* rather than for some broader nondirected moral duty or social goal owed to no one in particular. But, given what makes ILHRs distinctive among legal rights, this, I have suggested, is true not just for the gold miners but for all those on whose behalf we fight when their ILHRs have been violated.

Could Buchanan grant that all justified ILHRs must indeed serve to protect and serve underlying moral rights, but claim that a consideration of the nondirected duties and broader goals promoted by a proposed ILHR might still provide us, in some cases, with sufficient reason to implement it? If this were the case, then Buchanan could maintain his claim that the consideration of moral rights is not a necessary part of any successful justification of an ILHR. This strikes me as implausible for the reasons I have already given: If a justification for an ILHR merely mentioned broader social goals and nondirected duties, then we would not know whether it serves the essential function of all ILHRs, and so we would not be able to determine whether it is plausibly considered to be an ILHR or whether it is better classed among those international legal rights, like diplomatic immunity rights, that are worth implementing in their own right. Given the urgency and individualism associated with any human rights claim, this distinction is important, and would therefore form a crucial part of any successful justification of the legal right in question.

LEGAL DUTIES OUTSTRIP MORAL DUTIES

So far I have argued that individual moral rights must play a necessary role in the justification of any ILHR. I have also claimed that these moral rights need not have the same content as the ILHR they aid in justifying. ILHRs can, that is, be justified in virtue of their instrumental contribution to moral rights with a different content, or in virtue of being specifications of broader moral rights. This qualification is important because it allows us to evaluate Buchanan's other important objection to the Mirroring View, to which we turn in this section. We need to consider, even if it succeeds against the Mirroring View, whether the argument succeeds against the Grounding View. I will argue that it does not.

Buchanan argues that the existence of an underlying moral right cannot justify many important legal human rights—such as the legal human right to freedom of the press, democratic participation, and health—because the legal duties associated with each of these ILHRs far outstrip what could possibly be justified by appeal to the interests of the individual right-holder alone.¹³ To construe: The individual interests of any one person cannot plausibly ground stringent, third-party moral duties to set up, say, the wide-scale investment in public and social infrastructure required to realize a right to health, or the mechanisms for securing free and fair elections necessary to realize a right to democratic participation. Buchanan concludes that there cannot be a moral right to health or democratic participation that justifies the corresponding legal right. Here is the argument, which is worth quoting in full:

1. Many important international legal human rights have corresponding duties the fulfillment of which requires large-scale social investment and limitations on the liberty of large numbers of people.
2. Such duties, and hence the corresponding rights, are justifiable only because their fulfillment would positively impact the interests (or autonomy, etc.) of large numbers of people.
3. In the case of moral rights, the corresponding duties must be justifiable by appealing solely to some morally important aspect of the individual to whom the right is ascribed, because the duties are supposed to be owed, morally speaking, to the individual to whom the right is ascribed. (In contrast, in the case of legal rights, the fact that the correlative duties are owed,

legally speaking, to the individual right-holder does not imply that they are grounded solely in the moral importance of some aspect of the right-holder.)

4. (Therefore), there are no moral rights that correspond to (i.e., have the same content as) many important international legal human rights.
5. If there are no moral rights that correspond to many international legal human rights, then for many international legal human rights, it is not possible to justify them by appealing to corresponding moral human rights.
6. Yet many international legal human rights that cannot be justified by appealing to corresponding moral human rights are justifiable—they are suitable for inclusion in a system of international legal rights, given the functions such a system is supposed to perform and given the moral appropriateness of those functions.
7. (Therefore), in the case of many justifiable international legal human rights, showing that the legal right helps to realize a corresponding moral human right will not fully justify the legal right, not because there would be unacceptable consequences of legally realizing the moral right (as with the case of the right to be treated with respect), but because the moral right has a narrower scope than the legal right.¹⁴

Is this argument really any threat to the Grounding View? I am happy to accept point 4: Not all ILHRs must be justified by moral rights with precisely the same content. I am therefore also happy to accept both 5 and 7, which simply say that a moral right cannot be *sufficient* to justify many *corresponding* ILHRs. Nothing in this argument demonstrates that moral rights cannot be a *necessary* part of any successful justification of an ILHR, and so nothing in this argument impinges on the Grounding View.

We can illustrate this conclusion via a discussion of the right to democratic participation. In 1996 the Turkish Constitutional Court ordered the United Communist Party of Turkey (TBKP) to disband because it was a “threat to the territorial integrity of the Turkish nation.” This decision was taken on the basis of a chapter in the party’s program that referred separately to the Kurdish and Turkish nations, and to the ongoing strife between them. The Constitutional Court concluded that this reference reveals that the party aimed to secure separate self-governing rights for the Kurdish people, which is in contradiction with the principles and territorial integrity of the Turkish Republic. The Republic, it went on to claim, recognizes only one people (of which the Kurds are a part). The European Court of Human Rights claimed that the Constitutional Court’s order violated Article 11 of the

European Convention on Human Rights (ECHR), which protects rights to democratic assembly and association. It also noted that the rights protected by Article 11 should be interpreted in light of rights to freedom of expression and opinion enshrined in Article 10.¹⁵

Let us assume that the Constitutional Court did violate the individual legal human rights of members of the TBKP under the ECHR, and that these rights, and the Court's decision, are morally justified. The key question for us is, *On what basis* was this decision morally justified? The decision (let us assume) protects the functioning of democracy and pluralism in Turkey, and so promotes (let us assume) the general welfare of the Turkish people and the rule of law generally. But as we have seen, this is not enough to establish that the right to democratic participation is a bona fide ILHR. To do that, we need to determine how it serves the individual interests of, in this case, party members for their own sake. And here we turn to the interests of party members (many of whom are Kurdish) in freedom of expression and opinion, and to their interests in being recognized as full and equal members of Turkish society—interests that are strong enough to ground directed *moral* duties on the government not to undermine the ability of these party members to express their political opinions without fear of reprisal and not to arbitrarily exclude them from the political process. Using the analysis above, we then conclude that, in disbanding the party, the Constitutional Court violated not simply the legal rights of individual party members to democratic participation as established by the ECHR but also their deeper moral rights to freedom of expression and equal status. We therefore grant that there may not be a general *moral* right to democratic participation sufficiently broad to explain all the legal institutions that might be required to fully realize an ILHR to democratic participation (which would require reference to many broader goals and nondirected duties, as well as reference to particular consequences of legalization), but claim that any full justification of ILHRs to democratic participation must, at a deeper level, always refer to how such rights *also* serve

urgent, universal-concern-meriting moral rights (such as, in this case, moral rights to freedom of expression and equal status). In the absence of this connection to underlying moral rights, democratic rights to participation could not function as ILHRs.

CONCLUSION

The Heart of Human Rights makes a powerful case for the need to consider the moral justification not just of particular ILHRs or sets of ILHRs but also for the legitimacy of the ILHR system as a whole. Buchanan is right to say that the evaluation of the legal dimension of human rights practice is very important and often overlooked by philosophers working on human rights. However, I have argued that he is wrong to claim that the justification of ILHRs need not make any appeal to particular kinds of moral rights—such as, for example, those moral rights that deserve, say, universal moral, political, and legal concern.¹⁶ Any successful justification of an ILHR or set of ILHRs must make reference, at some level, to the way it serves to protect or realize an underlying moral right. This underlying moral right need not have the same content as the ILHR it serves to justify, and the underlying moral right will only in rare cases be sufficient to justify the ILHR, but it is still a necessary part of any plausible justification.

What implications does the Grounding View have for the philosophy of human rights in general? First, it demonstrates that the focus of predominant philosophical theories of human rights on particular kinds of moral rights—namely, those that merit the title of (moral) human rights—is not misplaced. While they can do better to explain the way such rights justify ILHRs, they are correct to see such rights as forming the core of human rights practice. Second, the Grounding View helps to focus the agenda for further research in this area: Which particular moral rights underlie the most important ILHRs and sets of ILHRs? How do such moral rights participate in the justification of the system as a whole? In this

essay I have discussed the moral right to equal moral status, to freedom of expression, and, in the case of health, to notification and fair warning. But how, more precisely, do each of these moral rights contribute to the overall justification of the ILHR, and how do they interact with broader goals and nondirected moral duties? Notice further that the fact that there is no necessary correspondence between the underlying moral rights and ILHRs allows for there to be many moral rights that go into the justification of a single ILHR or set of ILHRs, depending on the particular aspect from which we view the right. This multiplicity becomes particularly evident when we focus on ILHR *violations*, and when we focus on very complex legal rights, such as the right to health, as I have done here. There is much yet to be done in the philosophy of human rights, but we owe a great deal to Buchanan for illuminating the need for a broader focus on the legal aspects of human rights practice.

NOTES

¹ Allen Buchanan, *The Heart of Human Rights* (New York: Oxford University Press, 2013).

² When pressed, one might try then to tighten the conditions on what kinds of moral rights count as sufficient for justifying a corresponding ILHR. One might say, for example, that only those moral rights that are of international concern or in some way basic or that would merit international intervention ought to be legalized. But even here it strikes me that Buchanan is right that any of these fixes would still not make the constrained moral rights sufficient. Until we know how the moral right would be legalized and what further consequences such legalization would have, we cannot be sure that the creation of a corresponding ILHR would be all-things-considered justified. At most, we could say that the constrained moral rights give us *pro tanto* reasons to seek their legalization, but, absent further argument, we would not therefore be able to say whether we ought or ought not to implement the ILHR in question.

³ Buchanan, *The Heart of Human Rights*, p. 53.

⁴ W. N. Hohfeld, *Fundamental Legal Conceptions, As Applied in Judicial Reasoning* (New Haven: Yale University Press, 1964).

⁵ See, for example, Joseph Raz, "Rights and Individual Well-Being," *Ratio Juris* 5, no. 2 (1992), pp. 127–42; and M. H. Kramer, "Rights without Trimmings," in M. H. Kramer et al., ed., *A Debate Over Rights* (New York: Oxford University Press, 1998), pp. 60–100.

⁶ See, for example, Gopal Sreenivasan, "Duties and Their Direction," *Ethics* 120, no. 3 (2010), pp. 465–94; and Leif Wenar, "The Nature of Claim-Rights," *Ethics* 123, no. 2 (2013), pp. 202–29.

⁷ For this example, I draw on my Andrea Sangiovanni, *Humanity without Dignity: Moral Equality, Respect, and Human Rights* (Cambridge: Harvard University Press, forthcoming, 2017).

⁸ See Human Rights Watch, “Protecting Child and Adult Gold Miners Against Mercury: A Right to Health Issue,” October 17, 2011, www.hrw.org/news/2011/10/17/protecting-child-and-adult-gold-miners-against-mercury-right-health-issue.

⁹ Of course, one might just decide to call them legal human rights by, for example, embedding them in a treaty, but it is uncontroversial to claim that this would be to radically misunderstand the nature of the international legal human rights system for precisely the reason that Buchanan gives, and which I quote in the text.

¹⁰ Buchanan, *The Heart of Human Rights*, p. 27, emphasis in the original.

¹¹ Ibid.

¹² I am adopting a largely interest-based theory of rights for the purposes of illustration (as does Buchanan), but the argument would hold if we substituted “status” for “interests,” so I leave the distinction aside in what follows.

¹³ See Buchanan, *The Heart of Human Rights*, p. 58ff; and Gopal Sreenivasan, “A Human Right to Health? Some Inconclusive Scepticism,” *Aristotelian Society Supplementary Volume* 86, no. 1 (2012), pp. 239–65.

¹⁴ Buchanan, *The Heart of Human Rights*, pp. 63–64.

¹⁵ This summary is based on materials reproduced in Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context* (New York: Oxford University Press, 2008), p. 936ff.

¹⁶ I say much more about this specification of moral rights—i.e., moral human rights—as well as how it compares to both Orthodox and Political accounts of such rights in ch. 4 of Sangiovanni, *Humanity without Dignity: Moral Equality, Respect, and Human Rights*.